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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00ML/OCE/2016/0029
Property	:	39 Russell Square and maisonette D, Brighton, East Sussex BN1 2EF
Applicant	:	39 Russell Square Brighton Limited
Representative	:	Dean Wilson LLP
Respondent	:	Lincoln Estates Limited
Representative	:	ODT Solicitors LLP
Type of Application	:	Collective Enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993
Tribunal Member(s)	:	Judge D. R. Whitney
Date of Determination	:	10th April 2017

DECISION

BACKGROUND

1. This is an application for determination of the terms of acquisition and the premium payable pursuant to the Leasehold Reform Housing and Urban Development Act 1993 for the acquisition of the freehold of 39 Russell Square, Brighton. The application was made on 27th June 2016 by the Applicant.

2. Directions were issued on 20th July 2016 offering the parties a stay. Both parties by their representatives agreed such a stay. Subsequently further directions were issued on 20th July 2016.

3. After this the Premium payable was agreed but being subject to a leaseback of a flat owned by the Respondent. The terms of that lease have not been agreed and it is this that the tribunal is asked to determine. Directions were issued dated 10th March 2017 providing for provision of supplementary bundles and for the matter to be dealt with on written submissions. Those directions have been complied with.

THE LAW

4. The relevant law is contained within the provisions of the Leasehold Reform Housing and Urban Development Act 1993 ("the Act").

DISCUSSION AND DETERMINATION

5. The tribunal has been provided with a supplementary bundle containing submissions on the part of both parties. The tribunal has considered all of the documents within that bundle in reaching its determination. The tribunal thank both parties' solicitors for the complete and considered submissions.

6. At page 35 of the supplementary bundle was a list of the outstanding issues. This recorded that the price for the acquisition of the freehold of 39 Russell Square had been agreed. It was a term of the agreement that the Respondent would be granted a leaseback of the second floor flat known as Flat B owned by the Respondent. The form of the leaseback was not agreed with their being three issues for resolution:

    - Proposed inclusion of a clause allowing a reserve fund to be established;
    - Form of lease plan;
    - Whether additional clauses were required due to a suggestion that the Respondents flat may be in breach of building control requirements;

7. Both parties agree that terms were effectively agreed by way of an email from Claire Whiteman (of Dean Wilson LLP) to Jeremy Donegan (of ODT Solicitors LLP) timed at 11.35am on 11th January 2017 and found

at page 1 of Appendix B to the Applicants submissions. This confirmed that the premium and statutory costs were agreed subject to "...a new 999 year lease-back at a peppercorn...". The email concluded by saying "...the lease to be on the same terms as the others in the building (term and rent excepted)."

8. Thereafter a draft lease was prepared and there was some negotiation over the exact format and terms. A plan was prepared for the purposes of the new lease. Following this it was suggested that the layout of the flat did not match that held by the local authority as an internal wall was not in place. For the Applicants it was suggested that they would agree this plan but subject to an additional clause effectively seeking an indemnity for the Applicant if any issue arose over planning or building control matters relating to the layout of the flat. The Respondent refused such amendment taking the view the existing lease adequately dealt with matters and in particular that clause 3(i) offered protection to the Applicant.

9. As to a reserve fund the Applicant sought to include provision allowing for the establishment of a reserve fund and for the Applicant to contribute towards the same. The Respondent declined on the basis that the current leasing scheme continued no requirement and there was no certainty other flats within the subject property would have their leases so amended to require them to contribute to the same.

10. Both parties agree that the leaseback proposed is not a statutory leaseback to which Schedule 9 of the Act applies. The tribunal's jurisdiction is under section 24 of the Act allowing the tribunal to determine any of the terms of the acquisition remaining in dispute.

11. For the Respondent it is contended that the form of lease is agreed. The Respondents solicitors submit that following various telephone conversations and the email of 11th January 2017 referred to above it was agreed the form of lease would mirror the existing leases. The Respondents solicitors accept that some amendments were agreed to the initial version they typed most notably an increase in the on account service charge payments. It is submitted that by 3rd March 2017 the form of lease (save for the plan) was agreed. As to the plan the Respondent invites the tribunal to agree and adopt the plan found at page 43 of the bundle.

12. It appears to this tribunal that the Applicant accepts that the form of plan to be incorporated in the lease is that found at page 43 of the bundle. Their submissions do not appear to make any contrary assertion. The Tribunal agrees that this is the appropriate plan given it reflects the true layout of the flat and the provision of such a plan is a necessary requirement of the registration of the lease.

13. Turning to the inclusion of provision of a reserve fund the tribunal does not agree to this. The terms of the acquisition were that the leaseback was to reflect the existing leases. These contained no provision for a

reserve fund as the Applicant should have been aware. If the parties had contemplated such an amendment then this should have been spelt out as a term of the negotiation. It was not and in this tribunals determination the Applicant cannot now require the Respondent to agree to the same.

14. This leaves the question as to whether an additional clause is required as contended for by the Applicant.

15. The tribunal is not satisfied that the form of lease was ever agreed in totality. Whilst the wording appeared agreed it is clear that consideration was still being given to the plan and its form. As happened this then had a bearing on the wording of the lease. The form of plan was a material part of the form of lease in this tribunal's determination having regard to the evidence adduced by both parties. The draft lease prepared following the existing leases required a plan and if required such a plan is required to follow Land Registry requirements and so in our determination was material to concluding the form of lease.

16. The above being said it is clear that the terms agreed were on the basis that the new lease would mirror the existing. The Applicant knew or ought to have known what provisions this contained or did not contain. Plainly the leases were not in a modern format given that the lease for flat D at page 24 of the bundle was dated 12th April 1978. The Applicant has chosen to acquire the freehold on the terms agreed.

17. The tribunal has considered carefully the wording of clause 3(i) and the proposed wording of the additional clause 3(k) proposed by the Applicant. The tribunal determines that it does not agree to the inclusion of clause 3(k). Again it was open to the Applicant to have suggested and agreed that the form of lease required modernisation and addition. The Applicant did not do so. It was simply agreed that the leaseback to be granted would mirror the existing leases. In any event clause 3(i) would require the Respondent to comply with any notices which the local authority may or may not serve.

18. For the avoidance of doubt the tribunal determines that the form of leaseback should be in the form found at pages 21 to 33 of the Respondents Submissions and the lease plan should be that at page 43 of the Respondents submissions.

Judge D. R. Whitney

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.